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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FREEDOM REPUBLICANS, INC. and
LUGENIA GORDON, PRESIDENT,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether standing to challenge rules governing delegate apportionment and committee membership at the Republican National Convention as racially discriminatory within the meaning of Title VI of the Civil Rights Act of 1964 requires showing that federal convention funding caused the alleged discrimination, and that the injury would be redressed by termination of the funding.

2. Whether a multiracial organization of Republicans seeking to challenge racially discriminatory rules of the National Republican Party, whose complaint against the funding agency prevailed over a motion to dismiss in the district court but was dismissed on appeal for failure to show Article III causation and redressability, should have an opportunity to present evidence of causation and redressability on remand, where the "causation and redressability" issue was never raised before the district court.

LIST OF PARTIES

The parties to the proceeding are those appearing in the caption. However, the Republican National Committee appeared as *amicus curiae* before the United States Court of Appeals for the District of Columbia Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Freedom Republicans, Inc., and Lugenia Gordon, President, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 13 F.3d 412, and reprinted in Pet. App. A. That decision reversed a ruling by

the United States District Court for the District of Columbia, which is reported at 788 F. Supp. 600, and reprinted in Pet. App. B.

JURISDICTION

The Court of Appeals entered judgment on January 18, 1994, and denied a timely petition for rehearing on April 11, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III of the United States Constitution provides, in pertinent part:

> **Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls,--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the Unites States shall be a Party;--to Controversies between two or more States; between a State and Citizens of another State;--between Citizens of different States--between Citizens of the same State claiming Lands under grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

STATUTES INVOLVED

42 U.S.C. § 2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to

discrimination under, any program or activity receiving federal financial assistance.

42 U.S.C. §2000d-1 provides:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pusuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity

involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

STATEMENT

The Freedom Republicans, Inc., a black-led, multiracial, independent organization of Republicans founded in 1979, after exhausting administrative remedies,[1] filed a complaint in the United States District Court for the District of Columbia against the Federal Election Commission ("FEC" or "Commission") to enjoin the Commission to comply with Title VI of the Civil Rights Act of 1964 in distributing Federal convention funding under the Federal Presidential Campaign Act of 1974, 26 U.S.C. §§ 9000-9013.

Freedom Republicans alleged that the Republican Party's rules governing delegate apportionment and membership on convention committees and the Republican National Committee ("RNC") operate to exclude African-Americans and other racial and ethnic minorities from the Party's governance, and that its maintenance of non-voting racial and ethnic "auxiliaries," as a palliative to remedy the manifest underrepresentation of minorities, is impermissible under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*[2]

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[1] Freedom Republicans, having sought reform within the Party for a decade, filed on December 12, 1991 an administrative complaint with the Commission, including a detailed account of the discriminatory impact of the challenged rules, which was rejected by the FEC General Counsel for lack of jurisdiction in a letter dated December 23, 1991. Pet. App. 27a. Their suit against the Commission, rather than the Party itself, was necessitated by the statutory requirement for agency regulations interpreting and implementing Title VI. *See* nn.4, 10, & 11 *infra.*

[2] *See* nn 10 & 11 *infra* and accompanying text.

Freedom Republicans' complaint and attachments detailed numerous particularized injuries to their interests as both minorities and Republican Party members. It sought, *inter alia,* a return to the electoral college standard for apportioning delegate strength among the several states, with which the Party was founded but which it abandoned in 1916, after post-Reconstruction disfranchisement left black Republican delegates from the southern states without a voting constituency. [3]

Freedom Republicans moved for partial summary judgment to enjoin the Commission to adopt implementing regulations as mandated by 42 U.S.C. § 2000d-1, which would govern the processing and disposition of their complaint and without which a complaint or suit against the Party organization would be without legal basis.[4] The Commission brought a motion to dismiss, but did not seek summary judgment or challenge the factual basis of the standing allegations in the complaint. It argued, with respect to standing, that Freedom Republicans (who had lobbied for reform within the Party for

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[3] *See* n. 6 *infra.*

[4] Section 2000d-1 provides, "Each federal department or agency empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President." The President has delegated the approval function to the Department of Justice, E.O. 12,250, which coordinates agency regulations pursuant to 28 C.F.R. §§ 42.401 *et seq. See also* n.10 *infra.*

ten years and won a resolution at the 1984 convention to study the issue) had not offered evidence of having themselves sought to become delegates . The district court found otherwise, held in favor of standing on several grounds, and ordered the Commission to adopt Title VI regulations. Pet. App. 19a-20a. The Commission appealed.

On appeal the Commission urged for the first time, in addition to its numerous previous contentions, that Freedom Republicans lacked standing for failure to demonstrate causation and redressability as required by Article III of the United States Constitution, as interpreted in *Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130 (1992) ("*Lujan*"). On this new ground the Court of Appeals reversed and remanded with instructions to dismiss. Freedom Republicans filed a timely petition for rehearing and suggestion for rehearing en banc, on the ground that they are entitled, under *Lujan, supra,* to present evidence on remand of causation and redressability, especially because the Commission not only had failed to raise the Article III issue in the district court but had challenged standing in a motion to dismiss, under which all allegations in the complaint are taken to be true. *See Lujan, supra,* at 2137.[5]

In finding the appellees lacked Article III standing, the Court of Appeals reasoned that, if political considerations independent of Federal funding were responsible for the challenged delegate rules, then Freedom Republicans could not demonstrate the causation element implicit in the Article III

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[5] *See* lower court decisions in *Lujan,* involving remand for evidence on causation and redressability, cited in n.7 *infra.* Under Rule 12(b)(6), Fed. R. Civ. P., "the court must presume all factual allegations on the complaint to be true and all reasonable inferences are made in favor of the non-moving party." 6 MOORE'S FEDERAL PRACTICE 12.07.

"case" or "controversy" requirement. Likewise, they could not meet the "redressability" element without showing that the Party would change its rules rather than forego Federal convention funding. Pet. App. 16a. No part of the record was pertinent to these issues, as they had not been raised below. Nevertheless, the Court of Appeals found *as a matter of judicial notice* that the challenged rules were caused by independent political considerations. In doing so the Court relied on an *amicus* brief filed by the RNC, which did not, despite ample notice, appear before the Commission or the district court.

Freedom Republicans' petition for rehearing proffered evidence rebutting the RNC's account of the history and purpose of the challenged rules relied on by the Court of Appeals. The petition requested a remand to the district court for a hearing on the issue of standing at which the parties' evidence could be appropriately addressed.[6]

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[6] The Court of Appeals noted in its opinion that the challenged rules originated in 1916 "in the aftermath of devastating defeat in the 1912 elections" and were maintained for "pragmatic political considerations." Pet. App. 14a, 15a. Freedom Republicans cited authorities which unanimously conclude that the Party's abandonment of the electoral college standard for delegate apportionment was motivated by post-Reconstruction disfranchisement of southern blacks. The "political" motivation cited by the Court of Appeals was "the overrepresentation of states whose preferences did not translate into popular votes." But the Court ignored that "overrepresentation" was due to racial disfranchisement--black voters after Emancipation were Republican voters, but increasingly after the Compromise of 1877, when Federal troops were withdrawn from the South, they were deprived of the vote throughout the region. Lewinson, RACE, CLASS, AND PARTY: A HISTORY OF NEGRO SUFFRAGE IN THE SOUTH 80-81 (1963).

Moreover, it was not, as the Court observes, "the aftermath of devastating defeat in the 1912 elections" (Pet. App. 14a) that inspired the change. It was considerably earlier than 1912, and because of disfranchisement, that cutting the southern delegations was proposed.

The leading monograph on this period observes, "Although the GOP occupied a minority status in a sea of Democrats throughout the South in the decades following 1900, the party was nonetheless influenced by Bourbon moves to bring about disfranchisement," and concludes "Undoubtedly, the most significant long-term influence of the 1912-1916 schism among southern Republicans was its contribution to the ongoing Negro revolt against the GOP. . . . Much of the difficulty stemmed from a growing lily-whitism across the South and the resultant loss of Negro participation in party councils." Casdorph, REPUBLICANS, NEGROES, AND PROGRESSIVES IN THE SOUTH, 1912-1916 vi, 1-22, 208 (1981). Even the beneficiary of the soon-to-be-eliminated black delegate votes in 1912, President William Howard Taft, recommended cutting the southern delegations in 1908. *Id.* at 6. *See also* Kousser, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH (1974); Link, THE PARADOX OF SOUTHERN PROGRESSIVISM, 1880-1930 (1992); Sherman, THE REPUBLICAN PARTY IN BLACK AMERICA FROM MCKINLEY TO HOOVER, 1896-1933 (1973).

That the Republican Party has long been fully cognizant of the nexus between disfranchisement and underrepresentation is clear from testimony before the RNC by black Republicans such as Dr. George E. Cannon of New Jersey in 1923:

> Now we are interested in this question of representation in the National Convention not for the mere sake of the 23 delegates which would be denied, coming from the South, but underneath that is the principle or representation in this country and in the Republican Party. Upon that principle depends our prestige and standing as Republicans and as American citizens. Now the Negroes of the North have looked upon the reduction as planned by the National Committee as an intention and a desire to reduce the voice and vote of the Negro in the councils of the party. Now whether that is your intention or not does not matter so far as our conviction is concerned. But that is our honest conviction, and that is what I am here to tell you today. . . . And I wish to say to you that any solution, or any attempted solution, to the Negro question in the party or this country without the Negro participating will give the wrong answer. He must figure in the equasion [sic], and we are here today because we feel that we do not figure in the equasion that gave you this answer of reduction of representation, which you have planned.

Freedom Republicans' petition was grounded in this Court's decision in *Lujan, supra,* which was rendered after just such a remand.[7] As Justice Scalia, writing for the majority, there noted: "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* at 2137, *citing Lujan v. National Wildlife Federation,* 497 U.S. 871, 889 (1990). Freedom Republicans urged that they have from the outset been "fully capable of presenting ample and sufficient evidence of both causation and redressability."

The petition for rehearing was denied without explanation, Pet. App. 29a, and this petition followed.

REASONS FOR GRANTING THE WRIT

There are three compelling reasons for granting the writ of certiorari in this case. The decision below shifts the Article III standing test, in enforcement of Title VI of the Civil Rights Act of 1964, from a focus on the relation between a complainant and the challenged "program or activity," to the relation between the "program or activity" and the federal funding assisting it. In doing so, the decision conflicts with this Court's, and Congress', clear intent to encourage enforce-

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Minutes of Meeting of the Republican National Committee, Washington, D.C. 96-100 (December 11-12, 1923).

[7] *See* [same case] *Defenders of Wildlife v. Hodel,* 658 F.Supp. 43 (D.Minn. 1987) (standing denied); *Defenders of Wildlife v. Hodel,* 851 F.2d 1035 (8th Cir. 1988) (remanding); *Defenders of Wildlife v. Hodel,* 707 F.Supp. 1082 (D.Minn. 1989) (standing upheld); *Defenders of Wildlife v. Hodel,* 911 F.2d 117 (8th Cir. 1990) (affirming).

ment of Title VI of the Civil Rights Act of 1964 without regard to the connection between federal funding and "program or activity," and it conflicts with every other circuit that has addressed the issue. Second, it effectively denies a Title VI plaintiff a hearing *both* on the merits of the complaint *and* on whether Article III standing can itself be met. Third, it forecloses with finality any challenge to Republican Party rules and practices that obstruct black and minority participation--indeed, it unconditionally condones all such practices forever, however discriminatory in their effects.

I. THE DECISION BELOW CONFLICTS WITH CONGRESS, THIS COURT, AND EVERY OTHER CIRCUIT IN SHIFTING THE FOCUS OF ARTICLE III FROM THE NEXUS BETWEEN A TITLE VI PLAINTIFF AND THE "PROGRAM OR ACTIVITY" TO THE NEXUS BETWEEN FEDERAL FUNDING AND THE "PROGRAM OR ACTIVITY."

The decision below conflicts with the clear intent of the Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a, the sole and express purpose of which was to broaden the coverage of Title VI (and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*) to "all of the operations of" a federally funded entity. 42 U.S.C. §2000d-4a. That Act was specifically intended to legislatively reverse the interpretation by this Court of "program or activity" in *Grove City College v. Bell,* 465 U.S. 555 (1984), which limited coverage of the Act to the specific program or activity receiving federal funds. *Id.* at 573. Congress thereby affirmed that the Title VI complaint and enforcement process is applicable to specific programs and activities in which no federal funds are involved. Congress intended "to make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance."

S. Rep. No. 100-64, 100th Cong., 2d Sess. 2 (1987), *reprinted in* [1988] U.S. Code Cong. & Adm. News 6. It could not have done this without explicitly rejecting the requirement of any causal relationship, direct or indirect, between federal assistance and the injury alleged under Title VI.

Indeed, the decision below conflicts with this Court's decision in *Grove City College* itself, which (in a separate finding not addressed by the Civil Rights Restoration Act of 1987) held that Title VI covers federally funded educational activity even when benefits are paid directly to students. While the Court was divided in its decision to narrow the definition of program or activity, it was unanimous in holding that student aid dollars reaching the college through its students constituted federal financial assistance to the college. "There is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks from the Federal Government are subject to regulation." *Id.* at 564. This Court could not have so held without rejecting close Article III scrutiny of the causal nexus between federal assistance and the alleged Title VI injury. *See also Village of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 264 (1977) (critical nexus for Article III is that between plaintiff and alleged discriminatory program).

In its standing analysis the decision of the Court of Appeals, by requiring "fair traceability" in the causal connection between federal funding and the program or activity challenged for alleged discrimination, conflicts with all of the cases where other circuits have addressed the question. No other federal appellate court decision can be found in which Article III standing has been denied for failure to demonstrate that federal funding directly or indirectly caused the injury alleged under Title VI of the Civil Rights

Act of 1964. Article III considerations have instead been applied to evaluate standing according to the relationship between the Title VI complainant and the federally assisted "program or activity." *NAACP, Boston Chapter v. Harris*, 607 F.2d 514, 518-22 (1st Cir. 1979); *Evans v. Lynn*, 537 F.2d 571, 589-98 (2d Cir. 1975) (en banc), *cert. denied*, 429 U.S. 1066 (1977); *Doherty v. Rutgers School of Law--Newark*, 651 F.2d 893, 899 (3d Cir. 1981); *Bossier Parish School Board v. Lemon*, 370 F.2d 847, 851-52 (5th Cir. 1967); *Jaimes v. Toledo Metropolitan Housing Authority*, 758 F.2d 1086, 1092-1101 (6th Cir. 1985); *Hope, Inc. v. County of DuPage, Ill.*, 738 F.2d 797, 807 (7th Cir. 1984); *Keith v. Volpe*, 858 F.2d 467, 477-78 (9th Cir. 1988); *Otero v. Mesa Cty. Valley Sch. Dist. No. 51*, 568 F.2d 1312, 1314-15 (10th Cir. 1977); *see also Taylor v. Cohen*, 405 F.2d 277 (4th Cir. 1968); *United States v. Lovett*, 416 F.2d 386, 391 n.5 (8th Cir. 1969); *Anderson v. City of Alpharetta*, 770 F.2d 1575 (11th Cir. 1985) (housing discrimination).

The Court of Appeals reevaluated its own precedents on Title VI standing, explaining that they had been "undercut substantially" by this Court's decision in *Lujan v. Defenders of Wildlife, supra*. Pet. App. 10a. However, shifting the focus of Article III to the nexus between "program or activity" and federal funding cuts deeply against the very constitutional concerns expressed in *Lujan*. *Lujan* was concerned with excessive judicial intrusion upon the Article II, § 3 command that the Executive "take Care that the Laws be faithfully executed." *Id.* at 2145. Hence the Court articulated limits on the permissibility of citizen suits brought by remotely affected plaintiffs seeking to enforce a statute against someone else. But a contrary result occurs if the concern is shifted from the remoteness of a *plaintiff's* connection with the program or activity to the remoteness of the nexus with *federal funding*. The result is to provide

broad shelter from the explicit directive of the Civil Rights Restoration Act of 1987, sharply restricting coverage of Title VI against the expressed will of Congress and barring it altogether for the Federal Election Commission. Rather than supporting Article II by limiting citizen suits, the decision restricts congressional power to police discrimination by federal grantees.

Members of Freedom Republicans are not outsiders seeking to enforce a statute against someone else. They are members of the federally funded entity itself, the Republican Party. As such they are squarely within the zone of interests protected by the statute,[8] and, as the district court found, they are directly affected by the federally assisted activity itself. Pet. App. 20a. Unable to obtain a fair and open hearing from their party's own governing body, the RNC,[9] they have turned

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[8] The harm sought to be redressed by Congress was the subsidization of entrenched discrimination with federal funds: "Simple justice," said the message from President Kennedy transmitting the nondiscriminatory mandate of Title VI to Congress in 1963, "requires that public funds, to which taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination." S. Rep. No. 100-64, 100th Cong., 2d Sess. 2 (1987), *reprinted in* [1987] U.S. Code Cong. & Adm. News 4.

[9] Freedom Republicans successfully sponsored a resolution at the 1984 Republican National Convention for a study by the Party of the effect of the rules. Of numerous parties called to testify, only Freedom Republicans was denied an open hearing as provided by Party rules, and transcripts of its testimony were the only ones never made public. Party officials prepared a report on the resolution which, *inter alia,* misrepresents the Freedom Republicans position and cites erroneous information. The full 71-page report was never provided to the Committee for which it was prepared (nor, indeed, was Freedom Republicans' rebuttal), and upon objection to its adoption for this reason, the Committee was told "The 71 pages is [sic] for the plaintiffs in any potential lawsuit." Roger Alan Moore, General Counsel of the

to legislatively mandated procedures designed to vindicate the overriding interests of Title VI. If these plaintiffs have no standing under Article III to establish the application of Title VI to the funding of an entity of which they are literal members, where no law can be found exempting such coverage, Article III has the effect of obstructing the more compelling purpose of Article II, § 3--to ensure that the laws of the United States are "faithfully executed."

II. ARTICLE III CANNOT BE USED TO DENY PLAINTIFFS *BOTH* A HEARING ON THE MERITS *AND* ON WHETHER THEY CAN SATISFY ARTICLE III STANDING.

Although Freedom Republicans set forth detailed and comprehensive evidence of discriminatory effects resulting from Republican Party rules governing delegate apportionment and committee membership in a 64-page attachment to their administrative complaint to the Commission, no adversarial hearing has ever been held on the issues raised therein. Even more illogically, they have been denied any opportunity even to provide evidence satisfying the Article III standing requirement, evidence that was proffered in their petition for rehearing and is outlined in the foregoing Statement, *supra*, 7-9. As the Statement indicates, they are capable of satisfying even the strict Article III test applied by the Court of Appeals in this case.

Republican Party, Transcript of Meeting of Standing Committee on Rules 106 (1986). Fulfilling Moore's prophesy, the RNC cited this report as authoritative in its *amicus* brief and the Court of Appeals *sua sponte* requested a copy of the report before issuing its opinion in this case. The report was not part of the record before the district court.

In short, the Court of Appeals in effect found--*as a matter of judicial notice*--that the complaint is innately meritless. Not only were petitioners denied a hearing on the merits of their complaint, they were denied the same opportunity that was given to the plaintiffs in *Lujan v. Defenders of Wildlife*--to adduce evidence on the Article III requirements of causation and redressability. Petitioners properly and timely offered to rebut the account of causation adopted by the Court of Appeals and show that their injury could indeed be redressed by termination of federal funding.

There is nothing in the Constitution or laws of the United States that prohibits purely private racially exclusive political association. However, racial discrimination by a political party cannot constitutionally be supported by state action of any kind. *Smith v. Allwright*, 321 U.S. 649, 663 (1944). Because the Republican National Convention is federally funded, discriminatory rules governing delegate and committee membership are illegal under the explicit provisions of the Civil Rights Act of 1964, and the government-wide regulations implementing it.[10] As this Court said in *Lau v.*

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10 Congress' intent in the enactment of Title VI was to adopt a "regulatory model" for determining discrimination in programs receiving federal assistance. *See* Abernathy, TITLE VI AND THE CONSTITUTION: A REGULATORY MODEL FOR DEFINING DISCRIMINATION, 70 Georgetown L.J. 1 (1981). The President has delegated his statutory approval to the Department of Justice, E.O. 12,250, requiring the Attorney General to review proposed agency regulations and "develop standards and procedures for taking enforcement actions and for conducting investigations and compliance reviews." *Id.* This Court, in interpreting Title VI, has held that the views of a federal agency implementing the statute are binding on the courts even if at variance with constitutionally based standards of discrimination. *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.*, 463 U.S. 582, 591-92 (1983).

Nichols, 414 U.S. 563 (1974), "Discrimination [under Title VI] is barred which has [discriminatory] *effect* even though no purposeful design is present: a recipient 'may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination' or has 'the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.'" *Id.* at 567, *citing* 45 C.F.R. § 80.3(b)(2).[11] The challenged rules "substantially impair" the participation of African Americans in the funded program, the Republican National Convention.[12]

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[11] Identical wording is found in current Department of Justice model Title VI regulations, 28 C.F.R. § 42.104(b)(2), and in all other agency Title VI regulations. As Justice Department approval is required for all new agency regulations, the identical standard should be applicable to this case. *See* E.O. 12,250; 28 C.F.R. §§ 42.401 *et seq.* As an example of discriminatory effect, there are 1.9 million blacks living in the state of Maryland, or roughly 25% of the total population; there are roughly 4,000 blacks in Wyoming, or 0.8%. Yet current Republican delegate apportionment rules grant Wyoming 5.75 the delegate strength *per Republican voter* that they grant to Maryland--no matter how many Republican voters there are in either state. If an African American Republican candidate for President or Vice President of vast appeal were to draw the majority of all black voters, regardless of party affiliation, into the Republican primaries in 1996, black delegates would be greatly underrepresented at the convention even if virtually all of them registered nationwide to vote Republican.

[12] Since 1956, black delegates have never exceeded 3% of the total except in years in which incumbent Republicans have been candidates for reelection. The percentage approximately doubled from 1.9 to 4.2 in 1972, when Richard Nixon ran for reelection, and from 2.7 to 5.0 in 1992, when George Bush ran for reelection--both years in which Party officials had some capability to correct the paucity of blacks at the convention. Bositis, BLACKS AND THE REPUBLICAN NATIONAL CONVENTION 44 (1992). The challenged rules are unlawful even applying the more stringent *McDonnell Douglas Corp. v. Green* test for unlawful discrimination, which this Court declined to do for Title VI in

Moreover, the Party is in violation of specific Title VI prohibitions against racially and ethnically designated eligibility standards or quotas. At the time federal convention funding was adopted, Republican rules adopted official Party "auxiliaries" for blacks, Hispanics, "Heritage Groups," [encompassing Eastern and Southern Europeans and Asians] and "Jewish-Americans," all groups that reside in states that are systematically underrepresented at the convention. The auxiliaries are advisory and non-voting. The complaint alleges that those based on race, color and national origin violate discrete and specific provisions of the approved regulations that the Commission would be obliged to adopt as part of its statutorily required implementation of Title VI.[13]

Guardians Ass'n v. Civil Service Comm'n of New York, 463 U.S. 593 (1983), but which would permit a racial disparity given a rational relation to legitimate goals. The rules do not, as the Party claimed and the Court of Appeals assumed, uniformly reward Republican voters and thereby strengthen the Party. Rather, they reward *certain* of them--those living in the smaller and less urbanized states--with disproportionate influence four years later. But they also (through a permanent grandfather clause) reward the least populous states *without regard* to prior Republican victories. Before the 1992 election, the system hardly increased the chance of victory in a national election; it simply entrenched delegates from smaller states, especially ones that delivered their electoral college vote to the nominee in the previous election. After the Republican loss in 1992, its effect will be to entrench delegations representing what was in 1992 a *losing* national electoral coalition. As the system bears no rational relation to party success, it may be found under the *McDonnell Douglas* standard to be no more than a pretext. *See id.* at 805.

[13] 28 C.F.R. § 42.104(b)(1) provides, in pertinent part:

A recipient under any program to which this subpart applies shall not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

Meanwhile, Federal campaign and convention funding has the effect of entrenching the two major parties, severely diminishing the prospects of new entrants.[14] Because the Republican Party systematically underrepresents blacks and other minorities, it denies them the benefits of a two-party system. African Americans are beholden to the Democratic Party and restricted to one voice, one avenue for advancing their interests, and one version of their interests. Their access to only one party skews public policy regarding what may work toward their best interests, both individually and as a group, and grossly distorts public perception of their actual political and cultural values. It engenders such controversies as this Court encountered in *Shaw v. Reno,* 113 S.Ct. 2816 (1993)--increasing the demand for congressional districts that give blacks a majority without infringing on the territory of incumbent non-minority Democrats, no matter how oddly and illogically shaped such districts must be drawn.

(ii) Provide *any* disposition, service, financial aid, or benefit to an individual which is *different, or is provided in a different manner,* from that provided to others under the program;

(iii) Subject an individual to *segregation or separate treatment in any manner* related to his receipt of any disposition, service, financial aid, or benefit under the program;

(v) Treat an individual *differently from others* in determining whether he satisfies any *admission, enrollment, quota, eligibility, membership, or other requirement or condition* which other individuals must meet in order to be provided any disposition, service, financial aid, function or benefit under the program;

(vi) Deny any individual an opportunity to participate in the program through the *provision of services or otherwise* or afford him an opportunity to do so which is *different* from that afforded to others under the program . . . . (emphasis added)

[14] See, e.g., Baer, WHO HAS THE BODY? PARTY INSTITUTIONALIZATION AND THEORIES OF PARTY ORGANIZATION, 14 American Review of Politics 1-38 (Spring, 1993)

These considerations alone would warrant review by the Supreme Court. More serious is the fact that the Constitution has been applied to deny appellees a hearing on the merits of their complaint, as well as an opportunity to contest the "facts" relied on by the Court of Appeals in denying standing under Article III. The Court found that Freedom Republicans lacked standing for failure to demonstrate a causal connection between federal funding and the challenged rules. It based this conclusion on finding, as a matter of judicial notice, that the challenged rules derived from an independent "nonmonetary" cause: "So far as the *record* before us shows, the current delegate-allocation scheme of the Republican Party appears to be the product of complex political considerations that emerged and are sustained independently of any concern for funding." Pet. App., 16a (emphasis added). But there is no "record" pertaining to the origin and purpose of the challenged rules. The appeal was taken from a ruling that the Commission was legally obliged to adopt regulations, which would have provided the necessary legal context for a hearing on such questions.[15]

In lieu of citation to a nonexistent evidentiary record, the opinion of the Court of Appeals contains several citations to the CONGRESSIONAL QUARTERLY GUIDE TO U.S. ELECTIONS (1975), which simply notes the Party's rules changes without analysis of their historical causes. The GUIDE pretends no expertise regarding the history and purpose of the challenged rules. This leaves only one authority for the appellate court's

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[15] Without regulations adopted by the Federal Election Commission, there is no law to apply to the facts of any complaint that may be brought before the Commission under Title VI of the Civil Rights Act of 1964. *See* n.10 & 11 *supra.*

view of the history and purpose: an *amicus curiae* brief filed by the RNC, which includes a seven-page account claiming that the delegate scheme "was developed, and has since been maintained, for the purpose of ensuring that the Party's Presidential nominee has the greatest chance of prevailing in the national election." Brief of *Amicus Curiae*, 7-14. Freedom Republicans moved to strike this account as *dehors* the record. The opinion below reflects that the Court of Appeals nevertheless relied on the *amicus* brief, though "only for its assertion of the Party's motivation for the delegate-allocation scheme, and so [we] deny this motion [to strike]." Pet. App., 15a. But "the Party's motivation" is inseparable from whether there is an "independent" political cause or a rational relation to the Party's legitimate goals.

Two footnotes in the opinion of the Court of Appeals suggest other factors outside the record that influenced the finding of independent political considerations. Note 3 observes that "the Republican Party is not alone in according voting preferences to states that elect the party's candidates."[16] But Democratic Party bonuses, which were abandoned in 1968, did not include a grandfather clause, did not disfavor African Americans, and never accounted for more than 9.7% of the party's convention votes, as opposed to 27% at the Republican convention.[17] In note 4, the court observes that recent conflict over Republican delegate allocation has been related to "a battle between the conservative Republicans predominating in Western and

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[16] This contention is also found in the portion of the *amicus* brief of the Republican National Committee which Freedom Republicans moved to strike as outside the record. *Id.* at 14 n.4.

[17] See Parris, THE CONVENTION PROBLEM 34 (1972); *Ripon Society v. National Republican Party*, 525 F.2d 548, 549 (D.C. Cir. 1975).

Sunbelt states and the more moderate Republicans populating urban states." But Freedom Republicans can hardly be characterized as an anti-conservative organization, and its proposal would increase the representation of states such as Florida, California, and Texas, that generally send conservative delegates to the Republican National Convention.

III. WHY THIS CASE IS IMPORTANT.

There is one criterion motivating the petitioners in this litigation: to make possible, though hardly to assure, equalization of the voting strength of minorities in the Republican Party, to gain thereby the benefits of the two-party system. Congress enacted a law in 1964 that mandates nondiscrimination in "any program or activity receiving federal financial assistance." There is nothing in the statute, legislative history, or subsequent caselaw suggesting that Congress did not intend it to apply to funding of the major party conventions. Indeed, the activity at issue here controls the pulse of American political life.

By denying standing on Article III grounds, the Court of Appeals has denied petitioners, and all others, any opportunity to challenge practices that, if the Court of Appeals correctly dates them to 1916, had their origin in the unconstitutional disfranchisement of black Americans after Reconstruction. The grounds of that ruling come from the Constitution's "case or controversy" requirement. Unless this Court grants review, Article III will have been applied to deny petitioners, and any black Republican for all time, what every plaintiff has forever had in any United States court: a chance to adduce facts to support a valid and justiciable complaint. Unless the Court grants this petition, Article III will override the command of Article II, that the executive branch "take Care that the Laws be faithfully executed."

If the Party had received Federal convention funding subject to the strictures of the Civil Rights Act when the electoral college structure of the Republican convention was abandoned, the Act would clearly have been violated. Lingering effects of discrimination still existed when the Civil Rights Act of 1964 was adopted. Rather than grandfathering those effects, the Civil Rights Act was designed to deprive them of federal support.[18] Even more to the point, Article III of the United States Constitution was designed to guarantee, not to obstruct, judicial oversight of "the Laws of the United States." While its application in *Lujan v. Defenders of Wildlife* may have supported the Article II separation of powers, its novel and unprecedented application here would have the opposite effect.

Federal election campaign financing was introduced in 1976 for the purpose of reducing the influence of large private donations on the campaign process. Convention funding was initiated at the request of both parties, due to problems encountered in 1972, including the imputation of impropriety, in raising funds from corporate and other private sources.[19] It is entirely voluntary. If the Republican Party chooses to accept it, it must also accept the scrutiny that Congress has mandated in the Civil Rights Act of 1964.

Public scrutiny has not been the goal of the Freedom Republicans, who sought for a decade, but were denied, a fair hearing as prescribed by the Party's own procedures.[20] Nor is

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18 *See* n.8 *supra* and Abernathy, op. cit n.10 *supra.*

19 *See* Baer and Bositis, PARTY ORGANIZATION AND INTEREST ADVOCACY IN THE POST-REFORM ERA, 82-83 (1994).

20 *See* n.9 *supra.*

embarrassing scrutiny an inevitable consequence of this claim. Petitioners have not challenged all of the delegate apportionment and committee rules nor sought to dictate the manner in which the party might remedy the alleged injury. The implementing regulations themselves would not dictate how rules governing delegate apportionment and committee membership must be drawn, and they would provide for mandatory conciliation and voluntary compliance.[21] This case need not draw the Commission, nor the judiciary, into a political thicket. If the Court accepts this case for review and holds that the Commission is obliged to adopt implementing regulations under Title VI, as ordered by the district court, the Party will have an opportunity, untrammeled by bureaucratic or judicial interference, to choose by 1996 a course of reform that would satisfy petitioners' grievance and enlarge the Party's nationwide electoral appeal.

The question raised here is not whether, or even how, the Civil Rights Act must intrude upon political association. It is strictly whether a national party must meet some minimum standard of access for racial and ethnic minorities, if it chooses to accept federal convention funding. At the core of petitioners' concern is not a challenge to the balance of regional interests governing the Republican Party. It is the removal of barriers to a genuine African American constituency within it.

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[21] Contrary to the Commission's contention below, Freedom Republicans have always sought that it adopt (as the statute mandates) "regulations . . . of general applicability," not particularized controls over delegate selection. Such regulations would necessarily follow the mandate of 42 U.S.C. § 2000d-1 that no enforcement action be taken "until the department or agency has . . . determined that compliance cannot be secured by voluntary means."

The narrower question is whether the test for Article III standing under Title VI should shift from the relationship between the complainant and the challenged "program or activity" to the relationship between the "program or activity" and the federal assistance itself. Such a shift conflicts with all of the federal circuits and all authoritative caselaw applying Article III to Title VI cases. It conflicts with the intent of Congress to reject any such program/funding connection in the Civil Rights Restoration Act of 1987. Its effect will remove any incentive to comply with the Civil Rights Act of 1964 from any funding recipient who can point to plausible access to alternative funding. Indeed the decision below gives to wealthy recipients of federal funds, who can most plausibly point to alternative funding, the clearest privilege of having their federal cake, and discriminating too.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JUNE 1994

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-5214

FREEDOM REPUBLICANS, INC., and
LUGENIA GORDON,
Plaintiffs-Appellees,

FEDERAL ELECTION COMMISSION,
Defendant-Appellant.

January 18, 1994

PATRICIA M. WALD, Circuit Judge:

The Freedom Republicans, Inc., "a black-led, multiracial, independent organization of Republicans," *see* Freedom Republicans, TOWARD A PARTY OF EQUAL OPPORTUNITY i (1991), *reprinted in* Joint Appendix ("J.A.") at 30, filed a complaint in district court against the Federal Election Commission ("FEC" or "Commission") to enjoin the Commission's funding of the Republican National Convention under the Presidential Election Campaign Fund Act of 1974, 26 U.S.C. sec. 9000-9013. Freedom Republicans alleged that the Republican Party's delegate-selection processes and system of minority "auxiliaries" combine to discriminate against minority groups, and that the FEC's continued funding of party activities therefore violates Title VI of the Civil

Rights Act of 1964, 42 U.S.C. § 2000d. The district court granted partial summary judgment for Freedom Republicans, ordering the FEC to "promulgate regulations under Title VI of the Civil Rights Act of 1964 governing the selection of delegates to the publicly-funded national party nominating conventions." *Freedom Republicans, Inc. v. Federal Election Commission,* No 92-153 (D.D.C. Apr. 7, 1992) (as amended May 4, 1992). The FEC appealed. Because we conclude that Freedom Republicans lacked standing to advance its claim below, we vacate that order and remand with instructions to dismiss Freedom Republicans' complaint.

I. BACKGROUND

Since 1916, the Republican Party has employed variations of a "bonus delegate" system for allocating the number of delegates each state sends to the national nominating convention. Under the current bonus system, each state receives a base number of delegates equal to three times its electoral college vote. *See* J.A. at 56. Then, regardless of population, states electing Republican presidents, senators, or governors or sending a predominantly Republican delegation to the House of Representatives receive bonus delegates. *See id.*[1] As a result of this system, traditional Republican

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[1] The Republican bonus delegate scheme, as set forth in its National Convention Rules, provides as follows:

> From each State casting its electoral vote, or a majority thereof for the Republican nominee for President in the last preceding election: Four and one-half (4 1/2) delegates at large plus the number of the delegates at large equal to 60% of the electoral vote from each such State. In addition, one delegate at large shall be awarded to a State for any and each of the following public officials elected by such State in the year of the last preceding presidential election or at any subsequent election held prior to January 1, 1980:
>
> (a) A Republican United States Senator. . . .
>
> (b) A Republican Governor . . . .

stronghold states that are more likely to support Republicans in the general election are given a greater say in the nomination of the President than are states that consistently fall in the Democratic camp. *See* Brief of *Amicus Curiae* Republican National Committee at 10; Freedom Republicans, TOWARD A PARTY OF EQUAL OPPORTUNITY (1991), *reprinted in* J.A. at 22. In connection with this mission, Freedom Republicans has approached the Republican National Committee on several occasions with proposals to change the "bonus delegate" system to a system based strictly on the electoral college. *See, e.g., id.* at 22; Freedom Republicans, TOWARD A PARTY OF EQUAL OPPORTUNITY (1991), *reprinted in* J.A. 29-92, at 36. Freedom Republicans contends that the "bonus delegate" system results in decreased representation for the states in which minority groups are disproportionately settled, and that the provision of nonvoting minority "auxiliaries" at the convention provides cold comfort, stigmatizing the groups involved. *See* J.A. at 38, 52. Although the Republican National Committee responded to Freedom Republicans' 1984 presentation by creating a subcommittee to assess the impact of the delegate-allocation mechanism on minority participation, the subcommittee ultimately rejected the proposed electoral college formula in its June 1986 Final Report. *See* J.A. at 23; Brief of *Amicus Curiae* Republican National Committee at 11. The Republican National Committee has since rebuffed later initiatives on similar lines by Freedom Republicans. *See, e.g.*, Letter from Michael W. Grebe, Chairman of Standing Committee on Rules of the

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> (c) A Republican membership of at least half of the State's delegation to the United States House of Representatives . . . .

THOMAS M. DURBIN & MICHAEL V. SEITZINGER, NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES 162 (U.S. Govt. Printing Office 1980).

Republican National Committee, to Freedom Republicans (June 14, 1991), *reprinted in* J.A. at 28.

Frustrated in its effort to achieve change from within, Freedom Republicans pursued other channels. On December 12, 1991, Freedom Republicans sent an administrative complaint to the FEC urging the Commission to terminate funding of the Republican National Convention in view of the party's allegedly discriminatory practices of selecting delegates and maintaining nonvoting minority "auxiliaries." Freedom Republicans staked its claim on § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits discrimination on the basis of race, color, or national origin by any programs or activities receiving federal financial assistance. The FEC is charged with administering convention funding under § 9008 of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9000-13.[2] Freedom Republicans contended that the Commission provides federal financial assistance, and that the convention was therefore a "program[] or activit[y] receiving federal financial assistance," within the meaning of Title VI. Observing that "[a]t the very least, operation of Title VI would require that the FEC adopt implementing regulations," J.A. at 24, Freedom Republicans requested that the FEC "withdraw, suspend and terminate, and refuse to grant and continue, Federal financial assistance to the Committee on Arrangements for the 1992 Republican National Convention." J.A. at 27.

The FEC dismissed Freedom Republicans' complaint on the grounds that it did "not state any acts which appear to

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[2] Under the terms of the statute, the FEC accepts applications for convention funding, verifies the statements included in the applications according to its regulations, and certifies the applications to the Secretary of the Treasury for disbursement of funds. *See* 26 U.S.C. § 9008(g).

constitute a violation under our jurisdiction." Letter from Lawrence M. Noble, General Counsel, FEC, to Freedom Republicans (Dec. 23, 1991), *reprinted in* J.A. at 93. The FEC apparently premised its decision on the perception that its jurisdiction did not extend beyond consideration of compliance with the federal election laws. The Commission did, however, forward Freedom Republicans' complaint to the U.S. Department of Justice, which took no action.

In January 1992, Freedom Republicans and its President, Lugenia Gordon, brought their cause to the courts, filing a two-count complaint in district court against the FEC. *See* J.A. at 94-106. Count one alleged that the FEC was in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, for failure to adopt implementing regulations and to accept jurisdiction over Freedom Republicans' administrative complaint. Count two averred that the Republican Party, by employing its delegate-selection process and maintaining auxiliaries drawn on racial lines, was in violation of Title VI for providing disparate treatment to blacks and other minorities. Freedom Republicans sought an injunction ordering the FEC to promulgate regulations implementing Title VI, to accept jurisdiction over its complaint, and to terminate convention funding to the Reepublican Party until such time as the Party complied with the anti-discrimination imperative of Title VI.

On February 18, 1992, Freedom Republicans moved for partial summary judgment on count one of its complaint, asking the court to remand to the Commission for rulemaking under Title VI. The court granted this motion on April 7, 1992, directing the FEC to "begin rulemaking proceedings designed to consider the means through which the FEC will ensure compliance with Title VI" and dismissing the case from its docket. J.A. at 19. On April 17, 1992, the FEC filed

a motion to amend the district court's judgment, seeking clarification of "whether the Commission is directed specifically to promulgate Title VI regulations governing political parties' selection of delegates to their convention." Memorandum in Support of Motion to Alter or Amend, Apr. 17, 1992, at 1. The district court granted this motion on May 4, 1992, ordering the FEC specifically to "promulgate regulations under Title VI of the Civil Rights Act of 1964 governing the selection of delegates to the publicly-funded national party nominating conventions." J.A. at 20. The FEC filed a timely appeal with this court.

II. ANALYSIS

Compliance with the mandates of Article III is an essential prerequisite to the exercise of federal jurisdiction. We need not venture beyond the threshold question of standing in order to decide this case. As an organization, Freedom Republicans has standing to bring this suit in its members' stead only if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the individual relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *see also Competitive Enterprise Inst. v. NHTSA*, 901 F.2d 107, 111 (D.C. Cir. 1990). We find Freedom Republicans to be deficient on the first score.

To satisfy *Hunt*, the members of Freedom Republicans must independently meet the standing requirements of Article III. The formula for Article III standing has been much rehearsed. At bottom, standing requires (a) concrete injury to a legally-protected interest; (b) a causal connection between the asserted injury and the challenged conduct, such

that the injury is fairly traceable to the challenged conduct and not the result of independent action by a third party not before the court; and (c) likelihood that the injury will be redressed on the merits. *See, e.g., Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130, 2136 (1992) (*"Defenders of Wildlife"*); *Allen v. Wright,* 468 U.S. 737, 751 (1984); *Branton v. FCC,* 993 F.2d 906, 908 (D.C.Cir.1993); *Fulani v. Brady,* 935 F.2d 1324, 1326 (D.C.Cir. 1991). Because we find that the claims advanced below fail to comport with the causation and redressability requirements, we conclude that the individual Freedom Republicans, and hence, the organization itself, lack standing.

We note at the outset that, although the district court ordered the FEC to promulgate regulations rather than to terminate funding, the "procedural" aspect of the order is not dispositive for purposes of our standing analysis. The district court held in effect that Title VI required the FEC to provide an administrative mechanism through which Freedom Republicans could pursue its complaint. Our justiciability inquiry, however, must focus on Freedom Republicans' standing to bring its core substantive challenge to the FEC's failure to enforce Title VI vis-a-vis the Republican Party. The Supreme Court has instructed that we may not entertain suits alleging generalized grievances that agencies have failed to adhere to the law, but must instead focus on concrete and particularized injuries. *See, e.g., Defenders of Wildlife,* 112 S.Ct. 2130, 2143 (1992); *Ex parte Levitt,* 302 U.S. 633 (1937); *Frothingham v. Mellon,* 262 U.S. 447, 488-89 (1923). In order to make out constitutionally cognizable injury, plaintiffs must demonstrate that the allegedly deficient procedures implicate distinct substantive interests as to which Article III standing requirements are independently satisfied. *See Defenders of Wildlife,* 112 S.Ct. at 2142 & n.7; *Capital*

Legal Found. v. Commodity Credit Corp., 711 F.2d 253, 258 (D.C.Cir. 1983). To this task we now turn.

A. *The Injury-in-Fact Requirement*

Because we hold that Freedom Republicans is unable to satisfy the redressability and causation requirements of standing, we need not decide whether it makes out a judicially cognizable injury. Nonetheless, adequate examination of the causation and redressability questions requires that we at least identify the components of Freedom Republicans' alleged harm. Freedom Republicans contends that the current delegate-allocation scheme employed by the Republican Party dilutes its members' voting power at the Republican National Convention. *Cf. Ripon Soc'y v. National Republican Party*, 525 F.2d 567, 572 (D.C.Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976). In *Ripon Society*, citizens of individual states that did not reap victory bonuses challenged the Republican Party's delegate-allocation scheme on the grounds that their states were insufficiently represented at the national convention. Drawing an analogy to the interest in representation in a state or national legislature, this court found the diminution in plaintiffs' voting power to be a sufficient injury to confer standing. Although we do not decide the issue of injury in the instant case, we note that this case presents an alleged injury that is a step removed from *Ripon Society*. Here, a group representing minority members of the party challenges the same delegate-allocation scheme on the grounds that, given numerical disparities in minority populations across the nation, inadequate representation of certain states translates into inadequate representation of minority Republicans.

We view the auxiliaries claim as a facet of the basic discriminatory allocation charge, rather than as a distinct

injury unto itself. The provision of racially-drawn, nonvoting auxiliaries, according to Freedom Republicans, fails to cure any injury that may stem from the underrepresentation of these minority groups in the ranks of delegates; the auxiliaries are part and parcel of the principal discrimination charge. *See* Freedom Republicans, TOWARD A PARTY OF EQUAL OPPORTUNITY (1991), *reprinted in* J.A. 29-92, at 35-36.

B. *Causation/Redressability*

In contrast to the plaintiffs in *Ripon Society,* Freedom Republicans brought suit not against the Republican Party, which is the direct source of its alleged injury, but against the FEC. When plaintiffs' asserted injury stems from "the government's allegedly unlawful regulation (or lack of regulation) of *someone else,*" *Defenders of Wildlife,* 112 S.Ct. 2130, 2137 (1992) (emphasis in original), the "fairly traceable" and redressability prongs of standing analysis require more exacting scrutiny. "[W]hile not necessarily fatal to standing," the indirectness of injury "'may make it substantially more difficult to meet the minimum requirements of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.'" *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 44-45 (1976) (quoting *Warth v. Seldin,* 422 U.S. 490, 505 (1975)).

Because this court ruled previously on the issues of causation and redressability in the Title VI context, *see Women's Equity Action League v. Cavazos,* 879 F.2d 880, 885 (D.C.Cir. 1989) (*"WEAL I"*), we face as an initial matter the question whether the remaining two prongs of our standing inquiry have already been resolved in Freedom Republicans' favor. We conclude that they have not. In

WEAL I, which presented a challenge to federal funding of racially segregated public schools, we stated that

> We have heretofore determined . . . that federal funding of facilities that engage in proscribed discrimination is in part causative of the perpetuation of such discrimination, and that "initiating federal fund termination proceedings [is] highly effective in gaining compliance with federal antidiscrimination laws." . . . Furthermore, due respect for the legislative branch requires us to recognize that vigorous enforcement of laws Congress designed for palintiffs' benefit has the potential to redress in meaningful measure plaintiffs' injury.

Id. at 885-86 (quoting *Committee for Full Employment v. Blumenthal*, 606 F.2d 1062, 1066 (D.C.Cir. 1979); other citations omitted). Although couched in general terms, *WEAL I* did not reference precedents suggesting that funding termination proceedings had been effective in the past in eradicating school segregation--and thus in redressing plaintiffs' specific injuries. *See, e.g., National Black Police Ass'n v. Velde*, 466 U.S. 963 (1984); *Adams v. Richardson*, 480 F.2d 1159, 1163 n.4 (D.C.Cir. 1973). *WEAL I* bolstered its reasoning with the notion that due deference to congressional judgments required a finding of redressability.

Despite its broad language, we do not believe that *WEAL I* obviates our duty to scrutinize closely the relationship between convention funding and the alleged discrimination at issue in this case. As an initial matter, we note that the legislative deference rationale, relied on as partial, though not exclusive, support for the redressability holding, has been undercut substantially by *Defenders of Wildlife*, 112 S. Ct. 2130, 2145 (1992). In *Defenders of Wildlife*, the Supreme Court determined in the course of its discussion of procedural injuries that Article III bound Congress as well as the courts,

and implied that congressional findings with respect to causation and redressability to which we might have given deference in the past must now themselves independently satisfy Article III. Because of the express separation-of-powers concerns that animated the Court's justiciability inquiry in that case, *see id.*, it now seems clear that ordinary deference to legislative factfinding does not translate into deference to congressional constructions of the demands of Article III.

Apart from deference, however, we believe that *Defenders of Wildlife* calls into question the *WEAL I* holding with respect to *causation.* Although the *WEAL I* holding referenced cases containing statistical evidence on the effectiveness of termination proceedings, the court cited no similar precedent or independent evidence to support its conclusion as to causation, *i.e.*, the link between the inception or continuation of the alleged discrimination and federal funding. *See WEAL I,* 879 F.2d at 885-86. At the very least, *Defenders of Wildlife* stands for the proposition that it is "the burden of the plaintiff to adduce facts showing that [the unfettered choices made by independent actors] have been or will be made in such manner as to produce causation and permit redressability of injury." 112 S. Ct. at 2137. Because *WEAL I* cited no factual basis for causation, it appears not to have satisfied the more exacting scrutiny subsequently required by *Defenders of Wildlife.*

Moreover, *Defenders of Wildlife* makes clear that, even if the *WEAL I* redressability standard as applied to the facts of that case were justifiable, the opinion's precedential effect in other factual contexts is considerably more narrow than a broad reading of its language might suggest. *Defenders of Wildlfe* stresses the importance of immediate factual context in establishing causation and redressability, to the exclusion of broader, statutory technique-oriented rationales. As the

Supreme Court made emphatically clear in *Defenders of Wildlife*, "[t]he party invoking federal jurisdiction bears the burden of establishing" the elements of standing. 112 S. Ct 2136. A blanket presumption that in Title VI suits, a plaintiff need not demonstrate particularized causation or redressability would severely undercut the separation-of-powers concerns underlying Article III. Accordingly, we view the *WEAL I* redressability holding as circumscribed by the *WEAL I* facts, rather than as a conclusive presumption of standing for Title VI plaintiffs. We note in this regard that the cases cited by *WEAL I* in support of redressability provided formidable evidence of the successful impact of funding termination proceedings initiated by the Department of Health, Education and Welfare against racially segregated schools--*precisely the issue* in *WEAL I*.

Our task then remains to ascertain whether Freedom Republicans has satisfied its burden of demonstrating both a causal connection between the FEC and its asserted injury and the likelihood of redress by judicial means. We conclude that it has not. We find neither sufficient causal nexus between the actions of the FEC authorizing convention funding and the delegate-selection practices of the Republican Party nor adequate likelihood, as opposed to speculation, that the Party would choose to change its time-tested delegate-selection mechanism rather than forego the convention funding.

When plaintiff's claim hinges on the failure of government to prevent another party's injurious behavior, the "fairly traceable" and redressability inquiries appear to merge. *See Competitive Enterprise Inst. v. NHTSA*, 901 F.2d 107, 113 (D.C. Cir. 1990). In such cases, both prongs of standing analysis can be said to focus on principles of causation: fair traceability turns on the causal nexus between the asserted injury and judicial relief. *See Allen v. Wright*, 468 U.S. 737,

753 n.19 (1984). Despite these similarities, however, each inquiry has its own emphasis. Causation remains inherently historical; redressability quintessentially predictive. *See id.*

Upon careful review, we conclude that Freedom Republicans has not adduced sufficient evidence to demonstrate the requisite causal connection between the FEC and its asserted injury. By all accounts, the delegate-selection scheme currently employed by the Republican Party has been in place since early in this century. *See, e.g.*, Brief for Appellant at 14; Freedom Republicans, TOWARD A PARTY OF EQUAL OPPORTUNITY (1991), *reprinted in* J.A. 29-92, at 51. The system of bonus delegates was introduced in the aftermath of the convention of 1912, which was characterized as "the most tumultuous ever." CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 64 (1975). During the 1912 convention, the Party adhered to its traditional policy of allocating delegates on the basis of a state's electoral college votes. Southern states, which possessed convention voting strength that exceeded their propensity to elect Republicans, successfully boosted President William Howard Taft to the nomination over former President Theodore Roosevelt. Roosevelt bolted to the Progressive Party in protest, garnering 27.39% of the popular vote in comparison with Taft's 23.18% (8 electoral votes). *Id.* at 245, 284. The chief beneficiary of the internecine strife, and the victor in the general election with a southern sweep and 435 electoral votes, was the Democratic candidate, Woodrow Wilson. *See id.* Shortly after this stunning defeat, the Republican Party reformed its delegate-allocation scheme. *See id.* at 68. Under the new formula, which considered a state's Republican voting strength in addition to its electoral vote, the southern states lost over a third of their delegates. *See id.*[3]

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[3] We note that the Republican Party is not alone in according voting preferences to states that elect the party's candidates. The Democratic

The FEC's role in the funding of presidential nominating conventions began in 1974 with the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013. The Republican Party's practice of allocating delegates in accordance with Republican voting strength thus preceded public convention funding by fifty-eight years. Moreover, historical data strongly suggest the Party's particularized and nonmonetary motives in developing the bonus delegate system. In the aftermath of devastating defeat in the 1912 elections, the Republican Party pursued reforms that remedied a specific problem, the overrepresentation of states whose preferences did not translate into popular votes. This is basically the same rationale for preserving the delegate-selection scheme that has been proffered by the Party ever since,[4] *see* Brief of *Amicus Curiae* Republican National Committee at 7,[5] and plaintiff has adduced no evidence to

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Party first adopted rules to take account of states' Democratic voting strength in determining the convention vote allocation in 1944. *See* CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 83 (1975). The Democratic Party offers four alternative formulas for state delegate allocation, each of which takes into account the strength of the state democratic [sic] vote by measuring votes in the most recent presidential or gubernatorial elections. *See* THOMAS M. DURBIN & MICHAEL V. SEITZINGER, NOMINATION AND ELECTION OF THE PRESIDENT AND THE VICE PRESIDENT OF THE UNITED STATES 147-48 (U.S. Govt. Printing Office 1980).

[4] One commentator has, however, depicted continued conflict over the delegate-allocation scheme as a battle between the conservative Republicans predominating in western and sunbelt states and the more moderate Republicans populating urban states. *See* Ronald Brownstein, *Conseratives' Victory on Republican Party's Delegate Rules May Give Them the 1988 Presidential Nomination,* NAT. J. Sept. 1, 1984, at 1610.

[5] Freedom Republicans moved to strike portions of the Brief of *Amicus Curiae,* the Republican National Committee, containing background

suggest the contrary. In light of this, it would take a leap of logic to find causation for the bonus delegate system in public funding. As in *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976), the injury alleged in Freedom Republicans' complaint is not fairly traceable to any encouragement on the part of the government, but appears instead to be the result of decisions made by the Party without regard to funding implications. *See also Allen v. Wright*, 468 U.S. 737, 759 (1984) ("The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing.").

Nor can we confidently predict any causal connection between a possible judicial response and the redress of appellee's injury. For fifty-eight years, the Republican Party maintained a bonus delegate scheme when the Party itself was responsible for drumming up the funds necessary to provide a convention. In the absence of any evidence that the perpetuation of the scheme is founded on other than pragmatic political considerations, we would be venturing into the realm of pure speculation were we to attempt to foretell the Party's response to termination of its present funding. Although current levels of public funding are substantial,[6] and the Republican Party would inevitably face a

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material on the history of the delegate selection rule at issue. We rely on the Brief only for its assertion of the Party's motivation for the delegate-allocation scheme, and so deny this motion. *See Stabilisierungsfonds fur Wein v. Kaiser Stuhl Wine Distributors*, 647 F.2d 200, 201 (D.C.Cir. 1981).

[6] Section 9008(b)(1) of the Presidential Election Campaign Fund Act of 1974, 26 U.S.C. § 9000-9013, provides that "the national committee of a major party shall be entitled to payments . . . with respect to any presidential nominating convention, in amounts which, in the aggregate, shall not exceed $4,000,000." The statute also provides for annual

problem if its funding, but not that of the Democrats, were to be withdrawn,[7] we cannot begin to predict on this record what impact withdrawal might have on Party decisionmaking as to so vital a political decision as delegate-allocation. We must conclude, under the instruction of *Defenders of Wildlife*, that Freedom Republicans has not borne its burden of adducing evidence to demonstrate that it is "'likely,' as opposed to merely 'speculative,' that [its] injury will be 'redressed by a favorable decision.'" 112 S.Ct. 2130, 2136 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

III. CONCLUSION

We hold that Freedom Republicans did not meet the causation and redressability requirements necessary for standing under Article III of the Constitution. So far as the record before us shows, the current delegate-allocation scheme of the Republican Party appears to be the product of complex political considerations that emerged and are sustained independently of any concern for funding. Nor can we with any confidence predict that action on our or the FEC's part would redress Freedom Republicans' asserted injury. Accordingly, the judgment of the district court is

Vacated and Remanded.

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adjustments in this cap based on increases in the price index. *See* 26 U.S.C. § 9008(b)(5) (referencing 2 U.S.C. § 441a(c)(1)). According to Freedom Republicans' complaint, the Committee on Arrangements for the 1992 Republican National Convention received in excess of $10,000,000 in convention funding. *See* J.A. at 98.

[7] But see n. 3, *supra*.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C/A No. 92-153 (CRR)

FREEDOM REPUBLICANS, INC. *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,
Defendant.

[Filed April 7, 1992]

MEMORANDUM OPINION AND ORDER OF CHARLES R. RICHEY, UNITED STATES DISTRICT JUDGE

In the instant lawsuit, the Freedom Republicans[1] make two principal claims against the Federal Election Commission (FEC). First, that the Defendant Federal Election Commission has failed to adopt rules and regulations implementing

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[1] The Freedom Republicans are members of the Republican Party committed to "maintaining the historic commitment of the Republican Party (the "Party") to the advancement of Americans of African descent, and with developing a genuinely representative organization for the Party without regard to race, color, or national origin." Complaint at para. 3

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d,[2] and they request that this Court order the FEC to embark upon such a rulemaking process. *See* Complaint at Count I. Secondly, the Plaintiffs contend that Title VI prohibits the FEC from providing any money to the Republican Party for its August 17-20, 1992 National Convention in Houston, Texas, because the Republican Party's "auxiliary" delegate system discriminates against African-American members of the Republican Party. *See* 42 U.S.C. § 2000d-1 (establishing procedures whereby federal funding is withdrawn when money perpetuates discrimination). *See* Complaint at Count II.

The Plaintiffs have moved for partial summary judgment on Count I of its complaint, asking the Court to remand this matter to the FEC with directions that the agency adopt rules enforcing the provisions of Title VI. The FEC has moved to dismiss the entire Complaint, claiming, *inter alia*, that the Plaintiffs do not have standing, have not exhausted their administrative remedies and that Title VI does apply to the FEC. Upon consideration of the parties' Motions, the record herein, the applicable law and contentions advanced at the oral argument on March 23, 1992, the Court shall grant the Plaintiffs' Motion for Partial Summary Judgment and shall

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[2] Title VI, which is codified at 42 U.S.C. § 2000d, provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Under 42 U.S.C. § 2000d-1, "[e]ach Federal department and agency which is empowered to extend federal financial assistance to any federal program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 2000d . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."

remand this matter to the agency with directions to begin the rulemaking process in order to adopt rules implementing the provisions of Title VI of theCivil Rights Act of 1964.

Prior to considering the merits of the claims with respect to Title VI, it is necessary to consider the FEC's assertions that the Plaintiffs have no standing to bring this lawsuit. In *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 97 S.Ct. 2434 (1977), the Supreme Court established a three-part test for organizational standing. [3] Under this test, an organization may sue on behalf of its members if: (1) its members would otherwise have standing; (2) the interests to be protected are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members. *Id.* at 2441. The Plaintiffs meet each prong of the *Hunt* test.

First, individual members of the group could have maintained an action. It is beyond cavil that Title VI of the Civil Rights Act of 1964 endeavors to protect all Americans from invidious discrimination, particularly those Americans of African descent who have long suffered abuses on the basis of race. Title VI entitles the Plaintiffs to a private right of action against the agency for dereliction of its enforcement duties. *See Abramson v. Bennett,* 707 F.Supp. 13, 15-16 (D.D.C. 1989), *aff'd,* 889 F.2d 291 (D.C.Cir. 1989). These individual Freedom Republicans have "alleged such a personal stake in the controversy as to warrant *his* [or her] invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his [or her] behalf." *Warth v. Seldin,* 422

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[3] Although Lugenia Gordon is also named as a Plaintiff in the above-captioned case, she sues only in her capacity as President of the Freedom Republicans. Complaint at para. 4. Thus, the standing of the Freedom Republicans, as a group, is critical to the standing inquiry.

U.S. 490 (1975). At oral argument, Plaintiff's counsel made clear that members of the Freedom Republicans have sought to become delegates over a number of years, only to be relegated to the allegedly discriminatory auxiliary status. Moreover, the Plaintiffs have argued that the allegedly discriminatory delegate system in the Republican Party stigmatizes and stifles members of the Freedom Republicans, a majority of whom are Americans of African descent, by treating African American Republicans differently than other members of the Party. This injury to the group members, albeit indirect, is also a sufficient basis upon which to confer standing. *See United States v. SCRAP*, 412 U.S. 669 (1973).

Moreover, the interests which the Freedom Republicans seek to protect in this lawsuit are "germane" to the organization's purpose. It is undisputed that the Freedom Republicans are a bona fide organization committed to advancing the interests of African Americans through, and within, the Republican Party. *See Humane Soc. of the United States v. Hodel*, 840 F.2d 45, 58 (D.C.Cir. 1988) (the germaneness requirement is "undemanding" and requires only "mere pertinence between litigation subject and organizational purpose"). Finally, the Plaintiffs meet the *Hunt* test and may prosecute this action because the presence of individuals who have actually been denied delegate status on the basis of racial discrimination is not necessary. Although the presence of individual victims of discrimination would be necessary in an action for monetary relief, an organization, such as the Freedom Republicans, may assert the rights of its members in an action for declaratory and injunctive relief challenging an agency's interpretation of governing law, such as the FEC's interpretation of the applicability of Title VI. *See International Union, UAW v. Brock*, 477 U.S. 274 (1986) (granting standing where organization tests validity of agency interpretation of applicable law).

The FEC also asks this Court to dismiss the Plaintiffs' request for a rulemaking by arguing that the Plaintiffs failed to exhaust their administrative remedies. The Plaintiffs' administrative-level Complaint does put the FEC on sufficient notice of Plaintiffs' desire for a rulemaking to implement the provisions of Title VI, however. *See* Complaint at para. 24. Requiring the Plaintiffs to submit another, perhaps more formal petition for a rulemaking, as was suggested at the oral argument, would elevate form over substance.[4] Thus, this Court may now consider whether the FEC's dismissal of the Plaintiffs' request for a rulemaking was consistent with Title VI.

An agency's refusal to adopt rules and regulations for lack of jurisdiction is a reviewable decision. *See* 5 U.S.C. § 706(1). *Cf. In re Chemical Workers' Union*, 958 F.2d 1144, 1148-50 (D.C. Cir., 1992) (per curiam) (suggesting that agency's refusal to commence rulemaking is reviewable when unlawful or when product of undue delay). Upon further evaluation of the relevant statutes and case precedent, the Court finds that the FEC does have an obligation to promulgate rules and regulations to insure the enforcement of Title VI. The language of Title VI is necessarily broad, and applies on its face to the FEC as well as to both major political parties and other recipients of federal funds:

> Each Federal agency and department which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan or contract . . . is authorized and directed to effectuate the provisions . . . of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall

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[4] *See generally* 5 U.S.C. § 704 (once an agency denies a request, there is no duty under the Administrative Procedures Act to seek declaratory judgment or reconsideration within the agency).

> be consistent with the achievement of the statute authorizing the financial assistance with which the action is taken.

42 U.S.C. § 2000d-1. In fact, the FEC's own regulations acknowledge that the FEC must issue any loans, grants or contracts in a manner consistent with governing law:

> Public funds shall not be used to defray any expense the incurring of which violates any law of the United States or any law of the State in which such expense is incurred or paid, or any regulation prescribed under federal or State laws.

11 C.F.R. § 9008.6(b)(2). Although "primary responsibility for prompt and vigorous enforcement of Title VI rests with the head of each department and agency administering programs of Federal financial assistance," the Department of Justice also has a role in coordinating Title VI enforcement actions. *See* 28 C.F.R. § 50.3. *Cf.* E.O. 11246; E.O. 12250. The Court notes that the Department of Justice has articulated general guidelines to which the FEC must adhere in the absence of a formal rulemaking. *See* 28 C.F.R. δ 42.104.

The claims raised by the FEC in its Motion to Dismiss do not impede the Court from finding that the FEC must begin a rulemaking process for purposes of implementing Title VI as the Plaintiffs have requested. The FEC first contends that Title VI has no applicability to the funding of political conventions due to the overriding First Amendment concerns associated with regulating political activity. Although there has not been a full briefing and development of the facts on the First Amendment issue, the agency's recitation of First Amendment law does not square with this Court's understanding of the evolution of the First Amendment and the civil rights laws, as there are numerous cases in which the asserted interests of free speech and freedom of association have been overridden by the need to prevent state-sponsored

discrimination.[5] Furthermore, mere "concerns" about the First Amendment cannot justify the agency's total failure to attempt to articulate rules and regulations implementng Title VI. The agency cannot reasonably expect this Court to find that the First Amendment bars such a rulemaking, *in toto*, before the agency engages in some inquiry on the subject, which a Court could then review.

The agency also argues that the monies provided to political parties do not qualify as "federal financial assistance" within the purview of Title VI because Title VI "was meant to cover only those situations where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the ultimate beneficiary." *Soberal-Perez v. Heckler*, 717 F.2d 36,38 (2d Cir 1983), *cert. denied*, 466 U.S. 929 (1984). As a preliminary matter, the Court must note that *Soberal-Perez* is not binding authority in this Circuit. However, even assuming arguendo that *Soberal-Perez* correctly interprets Title VI, the agency's claim must fail; the funds provided to the political parties for their conventions meet the criteria espoused in *Soberal-Perez* because the FEC monies enable the party to provide a platform for other, ultimate beneficiaries, such as Republican candidates and party members.

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[5] *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (although First Amendment rights are implicated, Michigan statute prohibiting corporations from using corporate funds for independent expenditures in state elections does not run afoul of the First Amendment given the compelling interest in preventing corruption in the political process); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (California law requiring admission of women to Rotary Clubs is not violative of First Amendment right of freedom of association given compelling need to eradicate discrimination); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (Minnesota could require Jaycees to admit women as full voting members despite members' First Amendment associational rights).

Finally, the agency contends that, in enacting the Federal Election Campaign Act Amendments of 1974,[6] Congress expressed its intention that the public financing of political campaigns would not allow for government regulation of the conduct of a political party's internal affairs. The agency's resort to the legislative history of the Federal Election Campaign Act is unavailing in that nothing in the legislative history suggests a Congressional desire to prevent the FEC from enforcing the provisions of Title VI.

For all of these reasons, the Court shall grant the Plaintiffs' Motion for Summary Judgment as to Count I of the Complaint and shall direct the FEC to conduct a rulemaking process, with all deliberate speed, so that the Plaintiffs may receive the benefit of the agency's views as to the implementation of Title VI prior to the August 1992 National Republican Convention in Houston, Texas.[7]

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[6] Pub. L. 93-443, 88 Stat. 1263.

[7] The FEC also claims that the Court may not consider Plaintiffs' Complaint becaues the Plaintiffs have not exhausted the administrative remedies prescribed under 42 U.S.C. § 2000d-1. As a technical matter, the Plaintiffs have not exhausted the available administrative remedies in order to terminate the FEC's funding of the Republican Natioanl Convention at Houston in August, 1992 because they were cut off due to the FEC staff counsel's dismissal of their agency-level Complaint on December 23, 1991. *See Abramson v. Bennett, supra* (outlining the procedures to which a private party plaintiff must adhere in order for funding to be terminated under Title VI). By summarily dismissing the Plaintiffs' Complaint for lack of jurisdiction, the FEC did not enable Plaintiffs to exhaust the available avenues of administrative review. Thus, the Court shall not dismiss Count II at this time, but shall give the Plaintiffs the opportunity to reassert the claims made in Count II before the agency. The Court also expresses the precatory wish that the parties, with the assistance of the Civil Rights Division of the Department of Justice in its role as coordinator of the Civil Rights Act, and in

Accordingly, it is, by this Court, this 7th day of April, 1992,

ORDERED that the Defendant's Motion to Dismiss shall be, and hereby is, DENIED; and it is

FURTHER ORDERED that the Plaintiffs' Motion for Partial Summary Judgment on Count I of the Complaint shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that, with all deliberate speed, the Defendant agency shall begin rulemaking proceedings designed to consider the means through which the FEC will ensure compliance with Title VI of the Civil Rights Act, as amended; and it is

FURTHER ORDERED that the above captioned case shall be, and hereby is, DISMISSED from the dockets of this Court without prejudice to the right to make oral application to reopen within thirty (30) days of the final action of the Defendant agency.

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particular given its role in enforcing Title VI, *see* E.O. 11246 and E.O. 12250, will bring this case to a speedy and just conclusion consonant with the law.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE FREEDOM REPUBLICANS, INC. *et al.*,
Plaintiffs.

v.

Civil Action No.
92-153 (CRR)

FEDERAL ELECTION COMMISSION,
Defendant.

ORDER

Upon consideration of the Defendant's Motion to Alter or Amend this Court's April 7, 1992 Order in the above-captioned case, the Plaintiff's opposition thereto, andthe arguments presented at the April 29, 1992 Hearing, it is, by this Court, this 4th day of May, 1992,

ORDERED that the fourth ordered paragraph in the Court's April 7, 1992 Order shall be, and it hereby is, DELETED; and it is

FURTHER ORDERED that the fourth ordered paragraph in the Court's April 7, 1992 Order shall be replaced by the following:

> "FURTHER ORDERED that the Defendant Federal Election Commission shall promulgate regulations under Title VI of the Civil Rights Act of 1964 governing the selection of delegates to the publicly-funded national party nominating conventions. While the Court expects the Defendant to act expeditiously and with all deliberate speed, no deadline shall be

ordered because the Court has no authority to establish a specific timetable on this remand;

and it is

FURTHER ORDERED that all other provisions of this Court's April 7, 1992 Order shall remain in full force and effect.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

[Filed May 4, 1992]

APPENDIX D

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 23, 1991

Frederic Rogers Kellogg, Esq.
2027 Que Street, N.W.
Washington, D.C. 20009

Dear Mr. Kellogg:

This acknowledges receipt of your letter dated December 12, 1991, alleging a violation of Title VI of the Civil Rights Act of 1964 by the Republican National Committee.

The Federal Election Commission has jurisdiction over the Federal Election Campaign Act of 1971, as amended (the "Act") and Chapters 95 and 96 of Title 26, United States Code. After careful review of your correspondence, we have determined that your complaint does not state any acts which appear to constitute a violation under our jurisdiction. We have, however, forwarded your letter to the U.S. Department of Justice for its consideration.

If you have any questions, please contact me at (202) 219-3690.

Sincerely,

Lawrence M. Noble
General Counsel

BY: /s/ Lois G. Lerner
Lois G. Lerner
Associate General Counsel

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-5214 September Term, 1992

Freedom Republicans, Inc., et al.
[Appellees]

v.

Federal Election Commission,
Appellant

BEFORE: Wald, Buckley and Ginsburg, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing filed March 2, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert Bonner
Robert A. Bonner
Deputy Clerk

[Filed April 11, 1994]